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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 457

EDDIE J. VIATOR, Et Al.,
Appellants, Petitioners,

vs.

R. G. EDWINS, Sheriff, Et Al.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

Albert Sidney Johnston, Jr.,
William L. Guice,
Counsel for Appellants, Petitioners.

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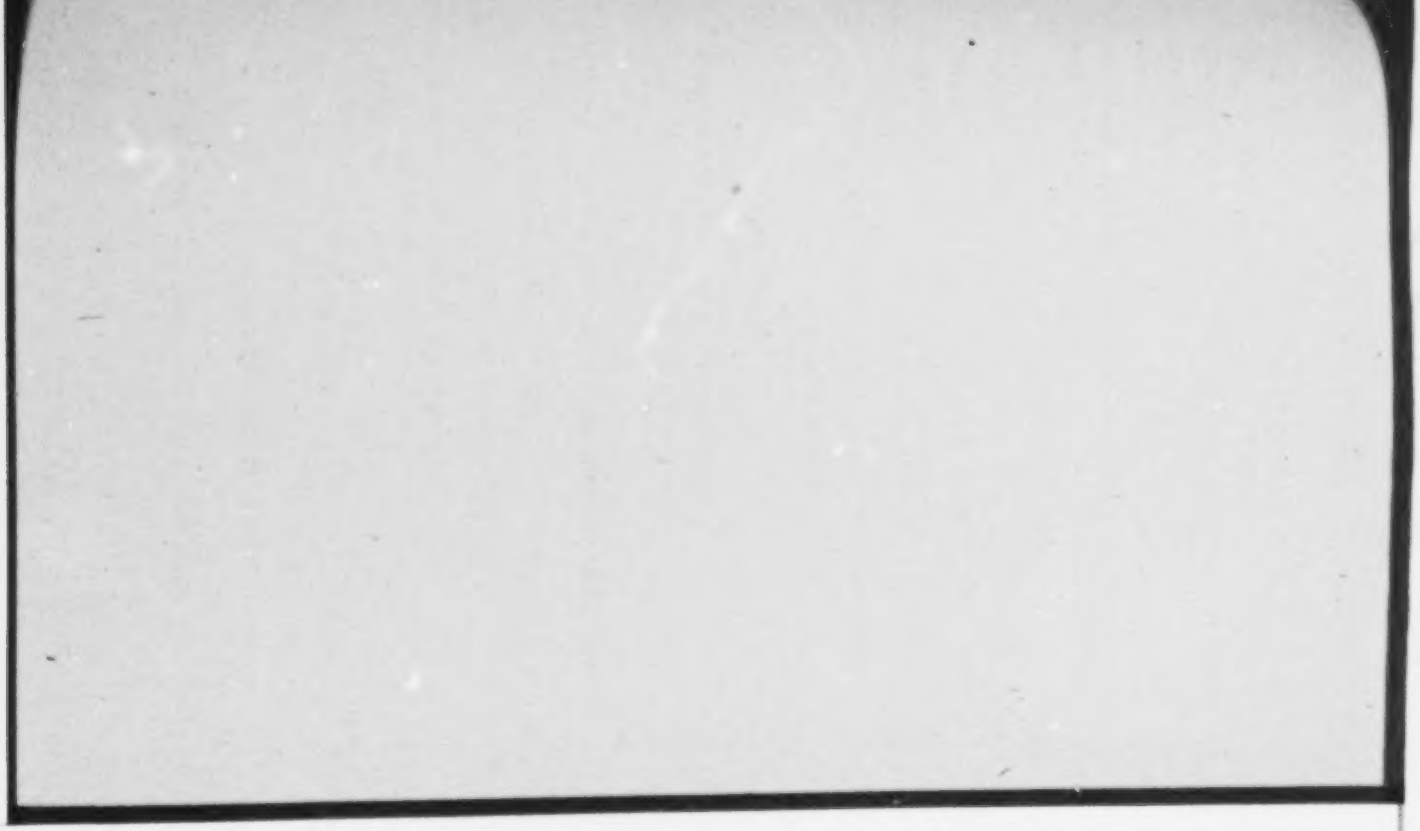

SUPREME COURT OF THE UNITED STATES

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No. 457

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

PETITION FOR REHEARING.

Come now the above named Appellants, and Petitioners, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

1. The judgment of the State court does not rest upon a basis adequate to support it; if a State court can preclude an appellant from asserting a Federal right, by a mere recitation in such judgment, then no appellant can ever successfully appeal to the Supreme Court of the United States, because, no matter what the state of the case against such appellant, the State court can always prevent an appeal to the Supreme Court of the United States.

2. The opinion of the State court, by Alexander, J., rendered on June 7, 1943, shown in the record of this cause, is a far cry from the law and the facts of the case. The opinion states that "It is hardly necessary to add that the demurrer did not admit the allegations of the bill as to the irregularity of the former proceeding and as to the invalidity of the judgment, which are mere conclusions of law." The Bill of Complaint charges facts to support the claim of the invalidity of the judgment, and overwhelmingly shows cogent reasons for such charge. The irregularities charged in the former proceeding, which eventuated in an adverse judgment on Certiorari, are shown on the face of the judgment itself. The State court refused to consider the merits of the case, said it could not consider the charge of lack of evidence to support the Order, because on Certiorari, it could and would only consider errors of law. The charge of lack of evidence, and that the Order was made without evidence to support it, and contrary to the indisputable character of the evidence introduced by appellant, was itself a question of law.

3. The State court has misstated the law of Mississippi, and the law of the land, and misapplied the law to the meager facts that do not appear. The State court purposely avoided deciding the Federal Question to prevent a review by the Supreme Court of the United States.

4. The Bill of Complaint charges, as facts, the following:

(a) Taxpayer was proceeded against jurisdiction, contrary to and beyond the case attempted to be made against him by the pleadings and notice of additional assessment.

(b) Taxpayer was proceeded against without evidence, and contrary to the indisputable character of the evidence offered by him, that he kept adequate records and preserved invoices, and did not owe any additional sales tax.

(c) The Field Representatives admitted they made the two additional sales tax assessments against taxpayer, purposely high, to take care of whatever they might be able to find, and by comparing the business of taxpayer, in the years 1937 and 1938, for which said additional assessments are said to have been made, with the business of other merchants in the year 1939.

(d) Said additional assessments are made, and the orders made and entered against taxpayer, without a finding of essential facts; of (1) Jurisdiction, and (2) Any factual showing of liability for additional sales tax, contrary to law and the evidence, and in an unconstitutional, unlawful, and illegal manner.

(e) The orders entered against taxpayer contain no finding of basic fact and essential fact, showing jurisdiction and liability for additional sales tax.

5. The demurrer to the Bill of Complaint admits the following:

(a) Appellees were without jurisdiction of the subject matter, and to make additional sales tax assessments, because they failed to prove that taxpayer neglected and failed to keep adequate records and preserve invoices.

(b) There was no evidence to sustain said additional assessments, and said additional assessments were made against taxpayer contrary to the indisputable character of the evidence offered by taxpayer.

(c) The Field Representatives of the State Tax Commission made the two additional sales tax assessments against taxpayer purposely high to take care of whatever they might be able to find, and by comparing the business of taxpayer in the years 1937 and 1938, for which said additional assessments are alleged to have been made, with the business of other merchants in the year 1939.

(d) Said additional assessments were made, and the orders made and entered against taxpayer, without a

finding of essential fact of (1) jurisdiction, and (2) a factual showing of liability for additional sales tax.

(c) The orders entered against taxpayer contained no finding of basic and essential fact showing jurisdiction and liability for additional sales tax.

6. The State court erroneously, and without foundation in fact, states that taxpayer was given an opportunity both by the Chairman of the Commission, and by the Tax Commission itself, to negative by evidence the facts on which the assessment was based. The Bill charges, and the demurrer admits, the assessments were not based on evidence, but made purposely high to take care of whatever the Field Representatives of the Commission might be able to find, and by comparing the business of taxpayer in the years 1937 and 1938, because of which the additional assessments are claimed to have been made from the best information by reason of the fact that taxpayer failed to maintain adequate records and preserve invoices for a period of two years, with the business of other merchants in Gulfport in the year 1939. When taxpayer challenged the additional assessments, and claimed they were made without evidence to support them, the State court held it could not and would not consider the charge of lack of evidence, and would only consider questions of law arising or appearing on the face of the record. When all of these facts were brought before the Court by sworn Bill of Complaint, admitted by demurrer, the State court holds the decision in the former appeal is the law of the case.

7. The State court erroneously, and without foundation in fact, states that the instant proceeding therefore constitutes an attempt to show what might have been shown in the former cause. In the former proceeding the State court refused to permit taxpayer to show anything, brushed aside his claim of constitutional right, failed to decide the

Federal question, without which the decision could not be made, and adds insult to injury by saying that regardless of conditions precedent to the exercise of the right to injunctive relief, under Section 420, Mississippi Code of 1930, the taxes against the collection of which the injunction was sought are, in view of the former decision of the State court, not "attempted to be collected without authority of law."

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court of Mississippi, be, upon further consideration, reversed.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellants, Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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Appellants, Petitioners,

vs.

R. C. EDWINS, SHERIFF, ET AL.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

There is one question, and one question alone, involved in our petition for rehearing, but it is our serious belief that the court in the light of fundamental constitutional rights as claimed by the petitioner, including rights given under the Fourteenth Amendment, should give serious thought to this petition, which is in no wise filed in a frivolous manner, or for the purpose of delaying the prompt execution of the mandate of this honorable court.

We claim that, while the Mississippi Supreme Court may not have so intentionally desired or intended, the effect of Judge Alexander's decision is to deny this Court's consideration of a constitutional right asserted by the petitioner

and of utmost importance, not alone to him, but to many other persons who may be faced with the same situation.

It might not have been the intention of the Supreme Court of Mississippi to have intentionally erred in deciding the case in the court below, on a purely non-Federal question, and thereby have prevented a consideration of our client's rights under the constitution by this Court. However, the effect of the court's decision is the same as we shall attempt to show here by an illustration.

In times past this Court has decided, and very properly decided, that in cases where a member of the negro race was convicted of crime, and it appeared that intentionally or purposely over a period of time, members of his race were excluded from the Grand and Petit Jury, that such action would violate his rights under the 14th Amendment, and other pertinent sections of the Constitution. This was decided by the court even though in these cases, otherwise, the following facts had appeared.

A. A legal Grand Jury was convened.

B. A legal indictment was returned.

C. An impartial and fair trial supported by evidence was had.

D. And a judgment rendered in accordance with the State law.

E. The court had jurisdiction of the subject matter before it.

Yet the ommission of one vital right that the man possessed invalidated the entire proceedings. Therefore, we assert that where many rights were denied us, all of which prevented a fair trial by some Tribunal of the question, whether or not taxes were due the State of Mississippi, it is

not just that our clients' constitutional rights should be ignored merely because the Supreme Court of Mississippi thought this case had been decided in a prior decision.

We call to the court's attention the decision of the Supreme Court of Mississippi in this case found as appendix B to the Brief of Appellant in opposition to motion to dismiss or affirm.

This decision would not foreclose our right to assert a defense based upon questions of fact, *dehors* the record. In fact, in the most emphatic terms, Judge Smith stated as follows:

> "Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code of 1930, the court to which a case has been removed by a writ of certiorari is 'confined to the examination of questions of law arising or appearing on the face of the records and proceedings'."

As appears from the decision of Chief Justice Smith, rendered on January 12, 1942, the unlawful proceedings of the State Tax Commission of Mississippi was approved on the ground that said Commission could make additional assessments for sales tax without regard to the reasons given in the notice to taxpayer. We earnestly contend that such action is condemned by this Court in the case of *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, where the court said:

> "In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent, and the record shows no consent, is contrary to fundamental principles of justice. *Reynolds* v. *Stockton*, 140 U. S. 254, 268, 269, 35 L. Ed. 464, 468, 469, 11 Sup. Ct. Rep. 773."

In the suit filed in the Chancery Court of Harrison County, Mississippi, the petitioner and appellant here, the complainant there, aside from raising the questions of law previously raised, and which might have been in the Record and considered by the Supreme Court in the case Judge Smith decided, raised further vital questions of fact, all of which were they true, would have meant that our client was not only deprived of the equal protection of the law and his property taken without due process of law, but that this was done in an arbitrary and brutal manner by the State Tax Commission, who Gestapo-like went riding amuck, striking at will with the whip of taxation, against all persons whom their agents felt animus towards.

We charge that although the law provided for a hearing, that no hearing was had, that there was a meeting but that at this meeting the State did not produce the evidence it claims supported its judgment. It did not allow cross-examination of the witnesses; it did not allow us to present evidence, either oral or in writing, but the examining official, in the nature of a Master who reports to a court, took the unsupported statement of one of his minions, a Field Agent, that the assessment was correct because it reflected the experience of other merchants in other years.

This honorable court in the case of *Hoeper* v. *Tax Commission of Wisconsin, et al.*, 284 U. S. 206, 52 S. Ct. 120, through Mr. Justice Roberts, held the provision of a statute of Wisconsin for addition of a wife's income to husband's, in computing husband's liability void, as denying due process, and held that an attempt by a State to measure tax on persons' property or income by reference to another's property or income is contrary to due process.

The Bill of Complaint charged these matters as matters of fact, and the demurrer admitted them as true.

Griffith's Mississippi Chancery Practice Sections 286 and 288.

From Section 286, Griffith's Mississippi Chancery Practice, we quote the following:

> "The demurrer then, is a pleading by which the defendant challenges the sufficiency of the Bill in substance, or in form and presents to the court the question of law as to whether upon such a bill, the defendant should be required to plead further; and by which, for the purpose of said challenge, and of the argument of said test in law, all the facts of the Bill well pleaded are, for the time being, admitted."

In *Tenant* v. *Barksdale*, 3 So. (Miss.) 80, and *Patterson* v. *Ingraham*, 23 Miss. 87, the Supreme Court of Mississippi said that the office of a demurrer is to submit to the court the sufficiency of the facts charged to support the legal conclusions essential to the complainant's right of action; and that by a demurrer, a party asserts his legal rights and stands on them.

From Section 288 above, we quote the following:

> "It has just been stated that, for the time being, and for all purposes of the argument of the test of law presented by the demurrer, it admits all material facts well pleaded in the Bill."

The above proposition of law is supported by the Mississippi cases of *Waddell* v. *DeJet*, 76 Miss. 110; *Baver* v. *Chess Company*, 83 Miss. 222; and *Myers* v. *Martinez*, 95 Miss. 104 and others too numerous to mention.

From Section 288 above, we further quote the following:

> "It must be noted that legal presumptions arising from facts go with the facts when the latter are sufficiently stated in the bill, and also, facts that are reasonably or necessarily implied from the facts stated may on demurrer be considered as true, and if the contrary is to be shown by co-nterva-ling facts, they must be set up in an answer and cannot be availed of by demurrer."

Here we call to the court's attention that Judge Griffith is a member of the Supreme Court of Mississippi, and that his work is recognized as authority in Mississippi.

Therefore we state as a bald, naked, legal fact that in Mississippi all facts properly pleaded are admitted by a demurrer, and that a former judgment or *res adjudicata* cannot be raised by demurrer but must be raised by plea. While the Supreme Court of Mississippi, speaking through Judge Alexander, rendered the decision being Appendix A to the brief above referred to, this opinion is not supported by authorities, is contrary to the laws of the State of Mississippi as decided by the same Court, and appears to have been rendered purely for the purpose of foreclosing on our right for this Court's consideration of a constitutional question that goes to the very right of existence of citizens of this country. We respectfully invite the court's attention to the fact that not a single authority is cited by Justice Alexander; we charge there is no authority for such opinion.

The constitution and its amendments are neither old in spirit or impotent because of age to meet every situation that faces our citizens when tyranny is attempted against them, and the one and only court that can finally say whether each citizen's plea shall remain heard or unheard, is the Supreme Court of the United States and a careful reading of Judge Alexander's opinion will show that he decided a question of fact on a demurrer which raised only questions of law and admitted all facts, and on the authority only of a previous decision, that is the decision of Judge Smith, which most emphatically stated that the court was not considering facts.

Therefore we still stand before this august tribunal asserting that not because of the language of the law, not because of the manner of hearing provided, not because

of any question that appeared in our bill, that could be a conclusion of law, but because of well pleaded questions of fact we had stated, and still state that the State of Mississippi was enforcing against us a judgment which would deprive us of our property without due process and that this judgment had not been rendered after a hearing or a trial.

The Bill charges, and we again state:

A. That we had no hearing.

B. That at the examination which was to have been a hearing, the State refused to introduce its evidence and refused us the right to produce evidence.

C. There was no consideration of any evidence when the judgment was rendered but the judgment was rendered upon the frivolous statement and allegations that our client owed this money because the experience of other merchants in other years would show that his report was insufficient.

D. The judgment was rendered arbitrarily without consideration of facts or law.

We know that a great American Jurist has stated that the right to tax is the right to destroy, but this right of destruction will not be upheld upon the appeal of any citizen unless the tax is legal and that a fair and just determination has been made as to whether or not under the law giving the tax life it has been fairly and justly determined.

Our client has not had a fair and just determination. The Supreme Court of Mississippi cannot deny this right by an opinion contrary to its own law, and wholly unsupported by the hundreds of authorities on tax questions heretofore decided by that court.

We believe our position is sound, in fact, we apologize for having taken the court's time to state it when it is so much more eloquently stated and with finer reasoning

in the case of *Truax* v. *Corrigan*, 257 U. S. 312, a part of the opinion of which reads as follows:

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the 14th Amendment, we are at as full liberty to consider them as was the State Supreme Court. Mackay *v.* Dillon, 4 How. 431, 11 L. Ed. 1046; Dower *v.* Richards, 151 U. S. 658, 667, 38 L. Ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. Bailey *v.* Alabama, 219 U. S. 219, 238, 239, 55 L. Ed. 191, 200, 31 Sup. Ct. Rep. 145; Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Mugler *v.* Kansas, 123 U. S. 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273; Corn Products Ref. Co. *v.* Eddy, 249 U. S. 427, 432, 3 L. Ed. 689, 693, 39 Sup. Ct. Rep. 325. In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. Kansas City Southern R. Co. *v.* H. Albers Commission Co. 223 U. S. 573, 591, 593, 56 L. Ed. 556, 565, 566, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. *v.* Cedar Rapids, 223 U. S. 655, 668, 669, 56 L. Ed. 594, 604, 32 Sup. Ct. Rep. 389; Southern P. Co. *v.* Schuyler, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 43 L. R. A. (N.S.) 901, 33 Sup. Ct. Rep. 277. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so

intermingled as to make it necessary, in order to pass upon the question, to analyze the facts. Northern P. R. Co. *v.* North Dakota, 236 U. S. 585, 593, 59 L. Ed. 735, 740, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Jones Nat. Bank *v.* Yates, 240 U. S. 541, 552, 553, 60 L. Ed. 788, 797, 798, 36 Sup. Ct. Rep. 429. In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state supreme court in this regard. The only respect in such a case in which this court is bound by the judgment of the state supreme court is in the construction which that court puts upon the statute."

We therefore most respectfully submit for the court's earnest consideration this petition with the hope that our feeble efforts will at least gain us a hearing before this Court on the only question at issue in this case, which is "has our client been deprived of a vital and substantial right under the Federal Constitution."

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
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Counsels for Petitioners.